Why the Second Amendment
Is your only right for protection

Constitutional Law for Dummies

How SCOTUS has defined the constitutional duties of law enforcement and qualified immunity to declare that police officers do not have a responsibility to protect you as an individual person.

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Constitutional Law and the Second Amendment

There is a practical reason for the right to keep and bear arms. Courts have held that neither the state nor the police owe a duty to protect the individual.

Introduction

If you have read my previous posts and law review articles you know that police have no duty to protect individuals. The police exist to do two things only: (a) patrol to deter crime; (b) after crime occurs to investigate and apprehend the perpetrators.

In other words, if you want to protect yourself and your family you must do it yourself — which is to say you must get a gun. The police owe you no duty in that respect.

What the Courts Have to Say

Let's start with Parkland.

In the case of MSD students Vs. Broward County.

Following the shooting at Marjory Stoneman Douglas High School in Parkland, Florida, some students claimed local government officials were at fault for failing to provide protection to students. The students filed suit, naming six defendants, including the Broward school district and the Broward Sheriff's Office as well as school deputy Scot Peterson and campus monitor Andrew Medina.

A federal judge ruled that the government agencies "had no constitutional duty to protect students who were not in custody."

Although that entire statement seems absurd, it's 100% true but the word that I want you to focus on is "custody". What does a person being "in custody" mean? Does it mean that any time you let your kids go to a sleepover they are then in the custody of their friends parents until returned to you? Does it mean that when you send your children to school that they are in the custody of the school bus driver until they arrive at school? Does it mean that they are in the custody of the school officials until they make it safely home and get off the school bus? What has the courts (and therefore the law) said what being "in custody" to actually mean?

"Neither the Constitution, nor state law, impose a general duty upon police officers or other governmental officials to protect individual persons from harm — even when they know the harm will occur," said Darren L. Hutchinson, a professor and associate dean at the University of Florida School of Law. "Police can watch someone attack you, refuse to intervene and not violate the Constitution."

The Supreme Court has repeatedly held that the government has only a duty to protect persons who are "in custody," he pointed out.

Moreover, even though the state of Florida has compulsory schooling laws, the students themselves are not "in custody":

“Courts have rejected the argument that students are in custody of school officials while they are on campus,” Mr. Hutchinson said. “Custody is narrowly confined to situations where a person loses his or her freedom to move freely and seek assistance on their own — such as prisons, jails, or mental institutions.”

Hutchinson is right.

The US Supreme Court has made it clear that law enforcement agencies are not required to provide protection to the citizens who are forced to pay the police for their "services."

This latest decision adds to a growing body of case law establishing that government agencies — including police agencies — have no duty to provide protection to citizens in general.

In the cases DeShaney vs. Winnebago and Town of Castle Rock vs. Gonzales, the supreme court has ruled that police agencies are not obligated to provide protection of citizens. In other words, police are well within their rights to pick and choose when to intervene to protect the lives and property of others — even when a threat is apparent.

In both of these court cases, clear and repeated threats were made against the safety of children — but government agencies chose to take no action.

A consideration of these facts does not necessarily lead us to the conclusion that law enforcement agencies are somehow on the hook for every violent act committed by private citizens.

This reality does belie the often-made claim, however, that police agencies deserve the tax money and obedience of local citizens because the agencies "keep us safe."

Nevertheless, we are told there is an agreement here — a "social contract" — between government agencies and the taxpayers and citizens.

And, by the very nature of being a contract, we are meant to believe this is a two-way street. The taxpayers are required to submit to a government monopoly on force, and to pay these agencies taxes.

In return, these government agents will provide services. In the case of police agencies, these services are summed up by the phrase "to protect and serve" — a motto that has in recent decades been adopted by numerous police agencies.

But what happens when those police agencies don't protect and serve? That is, what happens when one party in this alleged social contract doesn't keep up its end of the bargain.

The answer is: very little.

The taxpayers will still have to pay their taxes and submit to police agencies as lawful authority. If the agencies or individual agents are forced to pay as a result of lawsuits, it's the taxpayers who will pay for that too.

Oh sure, the senior leadership positions may change, but the enormous agency budgets will remain, the government agents themselves will continue to collect generous salaries and pensions, and no government will surrender its monopoly on the use of force.

That only leaves one other logical and overwhelming statement, your life and the lives of those you you are in your keeping, and your keeping alone. And now the government who has told us this in very plain language are trying to take away every single right that we as free born law abiding Americans have under the Second Amendment that gives us access to the absolute best tools available in order to protect ourselves and the ones we love, a firearm and all the while they are hypnotically surrounded by men with guns who's sole purpose is to ensure the safety of themselves and their loved ones. If it weren't so scary, it would be laughably ironic.

Supreme Court Cases

DeShaney v. Winnebago County, 489 U.S. 189 (1989), was a case decided by the Supreme Court of the United States on February 22, 1989. The court held that a state government agency's failure to prevent child abuse by a custodial parent does not violate the child's right to liberty for the purposes of the Fourteenth Amendment to the United States Constitution.

In 1980, a divorce court in Wyoming gave custody of Joshua DeShaney, born in 1979, to his father Randy DeShaney, who moved to Winnebago County, Wisconsin. A police report of child abuse and a hospital visit in January 1983, prompted the county Department of Social Services (DSS) to obtain a court order to keep the boy in the hospital's custody. Three days later, "On the recommendation of a 'child protection team,' consisting of a pediatrician, a psychologist, a police detective, the county's lawyer, several DSS caseworkers, and various hospital personnel, the juvenile court dismissed the case and returned the boy to the custody of his father." The DSS entered an agreement with the boy's father, and five times throughout 1983, a DSS social worker visited the DeShaney home and recorded suspicion of child abuse and that the father was not complying with the agreement's terms. No action was taken; the DSS also took no action to

remove the boy from his father's custody after a hospital reported child abuse suspicions to them in November 1983. Visits in January and March, 1984, in which the worker was told Joshua was too ill to see her, also resulted in no action. Following the March 1984, visit, "Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua suffered brain damage so severe that he was expected to spend the rest of his life confined to an institution for the profoundly mentally disabled. He died Monday, November 9, 2015 at the age of 36. Randy DeShaney was subsequently tried and convicted of child abuse." DeShaney served less than two years in jail.

Joshua DeShaney's mother filed a lawsuit on his behalf against Winnebago County, the Winnebago County DSS, and DSS employees under 42 U.S.C. § 1983. The lawsuit claimed that by failing to intervene and protect him from violence about which they knew or should have known, the agency violated Joshua's right to liberty without the due process guaranteed to him by the Fourteenth Amendment to the United States Constitution.

The court ruled 6–3 to uphold the appeals court's grant of summary judgment. The DSS's actions were found not to constitute a violation of Joshua DeShaney's due process rights.

The court opinion, by Chief Justice William Rehnquist, held that the due process clause protects against state action only, and as it was Randy DeShaney who abused Joshua, a state actor (the Winnebago County Department of Social Services) was not responsible.

Furthermore, they ruled that the DSS could not be found liable, as a matter of constitutional law, for failure to protect Joshua DeShaney from a private actor. Although there exist conditions in which the state (or a subsidiary agency, like a county department of social services) is obligated to provide protection against private actors, and failure to do so is a violation of Fourteenth Amendment rights, the court reasoned,

SCOTUS SAID:

“The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf… it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.”

Since Joshua DeShaney was not in the custody of the DSS, the DSS was not required to protect him from harm. In reaching this conclusion, the court opinion relied heavily on its precedents in Estelle v. Gamble and Youngberg v. Romeo.

Rehnquist's opinion stated that although the DSS's failure to act may have made it liable for a tort under Wisconsin state law, the Fourteenth Amendment does not transform every tort by a state actor into a violation of constitutional rights. Specifically, the act of creating a Department of Social Services to investigate and respond to allegations of child abuse may have meant that Winnebago County assumed a duty to prevent what Randy DeShaney did to Joshua DeShaney, and failure to fulfil that duty may have constituted a tort.

Castle Rock v. Gonzales

In the case of Castle Rock v. Gonzales, 545 U.S. 748 (2005), is a United States Supreme Court case in which the Court ruled, 7–2, that a town and its police department could not be sued under 42 U.S.C. § 1983 for failing to enforce a restraining order, which had led to the murder of a woman's three children by her estranged husband.

During divorce proceedings, Jessica Lenahan-Gonzales, a resident of Castle Rock, Colorado, obtained a permanent restraining order against her husband Simon, who had been stalking her, on June 4, 1999, requiring him to remain at least 100 yards (91 m) from her and her four children (son Jesse, who is not Simon's biological child, and daughters Rebecca, Katheryn, and Leslie) except during specified visitation time. On June 22, at approximately 5:15 pm, Simon took possession of his three daughters in violation of the order. Jessica called the police at approximately 7:30 pm, 8:30 pm, and 10:10 pm on June 22, and 12:15 am on June 23, and visited the police station in person at 12:40 am on June 23. However, since she from time to time had allowed Simon to take the children at various hours, the police took no action, despite Simon having called Jessica prior to her second police call and informing her that he had the daughters with him at an amusement park in Denver, Colorado. At approximately 3:20 am on June 23, Simon appeared at the Castle Rock police station and was killed in a shoot-out with the officers. A search of his vehicle revealed the corpses of the three daughters, whom it has been assumed he killed prior to his arrival.

Gonzales filed suit in the United States District Court for the District of Colorado against Castle Rock, Colorado, its police department, and the three individual police officers with whom she had spoken under 42 U.S.C. § 1983, claiming a federally protected property interest in enforcement of the restraining order and alleging "an official policy or custom of failing to respond properly to complaints of restraining order violations." A motion to dismiss the case

was granted, and Gonzales appealed to the Denver, Colorado Tenth Circuit Court of Appeals. A panel of that court rejected Gonzales's substantive due process claim but found a procedural due process claim; an en banc rehearing reached the same conclusion. The court also affirmed the finding that the three individual officers had qualified immunity and as such could not be sued.

The Supreme Court reversed the Tenth Circuit's decision, reinstating the District Court's order of dismissal. The Court's majority opinion by Justice Antonin Scalia held that enforcement of the restraining order was not mandatory under Colorado law; were a mandate for enforcement to exist, it would not create an individual right to enforcement that could be considered a protected entitlement under the precedent of Board of Regents of State Colleges v. Roth; and even if there were a protected individual entitlement to enforcement of a restraining order, such entitlement would have no monetary value and hence would not count as property for the Due Process Clause.

Justice David Souter wrote a concurring opinion, using the reasoning that enforcement of a restraining order is a process, not the interest protected by the process, and that there is not due process protection for processes.

Qualified immunity

In the United States, qualified immunity is a legal principle that grants government officials performing discretionary functions immunity from civil suits unless the plaintiff shows that the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known". It is a form of sovereign immunity less strict than absolute immunity that is intended to protect officials who "make reasonable but mistaken judgments about open legal questions", extending to "all [officials] but the plainly incompetent or those who knowingly violate the law". Qualified immunity applies only to government officials in civil litigation, and does not protect the government itself from suits arising from officials' actions.

The U.S. Supreme Court first introduced the qualified immunity doctrine in Pierson v. Ray (1967), enacted during the height of the civil rights movement, it is stated to have been originally enacted with the rationale of protecting law enforcement officials from frivolous lawsuits and financial liability in cases where they acted in good faith in unclear legal situations. Starting around 2005, courts increasingly applied the doctrine to cases involving the use of excessive or deadly force by police, leading to widespread criticism that it, as summarized in a 2020 Reuters report, "has become a nearly failsafe tool to let police brutality go unpunished and deny victims their constitutional rights".

In the case of Pierson v. Ray (1967), the Supreme Court first justified the need for qualified immunity from civil rights violation lawsuits for law enforcement officers by arguing that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being punished with damages if he does."

Bivins

Bivens and 42 USC § 1983 lawsuits

Qualified immunity frequently arises in civil rights cases, particularly in lawsuits arising under 42 USC § 1983 and Bivens v. Six Unknown Named Agents (1971). Under 42 USC § 1983, a plaintiff can sue for damages when state officials violate his constitutional rights or other federal rights. The text of 42 USC § 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ..

Similarly, under Bivens v. Six Unknown Named Agents, plaintiffs may sue for damages if federal officials violate their constitutional rights. However, not all Constitutional violations give rise to a Bivens cause of action. Thus far the Supreme Court has recognized Bivens claims for violations of the Fourth Amendment, the Fifth Amendment's equal protection component of due process, and the Eighth Amendment.

Castle Rock, Colo., v. Gonzales

The Supreme Court ruled that police cannot be sued for how they enforce restraining orders, ending a lawsuit by a Colorado woman who claimed police did not do enough to prevent her estranged husband from killing her three young daughters.

Jessica Gonzales did not have a constitutional right to police enforcement of the court order against her husband, the court said in a 7-2 opinion.

City governments had feared that if the court ruled the other way, it would unleash a potentially devastating flood of cases that could bankrupt municipal governments.

Gonzales contended that police did not do enough to stop her estranged husband, who took the three daughters from the front yard of her home in June 1999 in violation of a restraining order.

Hours later Simon Gonzales died in a gun fight with officers outside a police station. The bodies of the three girls, ages 10, 9 and 7, were in his truck.

Gonzales argued that she was entitled to sue based on her rights under the 14th Amendment and under Colorado law that says officers shall use every reasonable means to enforce a restraining order. She contended that her

restraining order should be considered property under the 14th Amendment and that it was taken from her without due process when police failed to enforce it. (*YES, you read that correctly, this woman had to use the argument that the restraining order AND HER CHILDREN were her PROPERTY and as such her constitutional rights under the 14th amendment preventing her PROPERTY be taken from her WITHOUT DUE PROCESS before she could even argue that the police failed in their duties and not that by them not doing their JOBS resulted in her kids being MURDERED because if the police would have taken immediate action her kids would still be alive TODAY!)

“The restraining orders are not worth anything unless police officers are willing to enforce them. They are just paper,” said Brian Reichel, the attorney for Gonzales. “If nothing else this case has shined the spotlight on a very important issue.”

Castle Rock, Co., police contend they tried to help Gonzales. Police twice went to the estranged husband’s apartment, kept an eye out for his truck and called his cellular phone and home phone.

Gonzales reached him on his cell phone, and he told her that he had taken the girls to an amusement park in nearby Denver. Gonzales contends that police should have gone to the amusement park or contacted Denver police.

The case is Castle Rock, Colo., v. Gonzales, 04-278.

Police protection vs. the capacity to defend oneself–

Perhaps the single most common argument against freedom of choice is that personal self defense has been rendered obsolete by the existence of a professional police force.

For decades anti-gun officials in Washington, D.C., Chicago, San Francisco and New York have admonished the citizenry that they don’t need guns for self-defense because the police will defend them. This advice is mendacious: when those cities are sued for failure to provide police protection, those same officials send forth their city attorneys to invoke [the] fundamental

principle of American law that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen.

Even as a matter of theory (much less in fact), the police do NOT exist to protect the individual citizen. Rather their function is to deter crime in general by patrol activities, and by apprehension after the crime has occurred. If circumstances permit, the police should and will protect a citizen in distress. But they are not legally duty bound even to do that, nor to provide any direct protection — no matter how urgent a distress call they may receive. A fortiori the police have no duty to, and do not, protect citizens who are under death threat, e.g. women threatened by former boyfriends or husbands

Warren v District of Columbia

An illustrative case is Warren v District of Columbia in which three rape victims sued the city under the following facts: Two of the victims were upstairs when they heard the other being attacked by men who had broken in downstairs. Half an hour having passed and their roommate's screams having ceased, they assumed the police must have arrived in response to their repeated phone calls. In fact, their calls had somehow been lost in the shuffle while the roommate was being beaten into silent acquiesence. When her roommates went downstairs to see to her, as the court's opinion graphically describes it, "For the next fourteen hours the women were held captive, raped, robbed, beaten, forced to commit sexual acts upon each other, and made to submit to the sexual demands" of their attackers.

Having set out these facts, the District of Columbia's highest court exonerated the District and its police, because (to reiterate) it is a fundamental principle of American law that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen.

In addition to the caselaw I have cited, this principle has been expressly enunciated over and over again in statute law.

The fundamental principle that the police have no duty to protect individuals derives equally from practical necessity and from legal history. Historically there were no police, even in large American or English cities, before almost the mid-19th Century. Citizens were not only expected to protect themselves (and each other), but legally required in response to the hue and cry to chase down and apprehend criminals. The very idea of a police was anathema, American and English liberalism viewing any such force as a form of the dreaded "standing army." This view yielded only grudgingly to the fact that citizens were unwilling to spend their leisure hours

patrolling miles of city streets and incapable even of chasing fleeing criminals down on crowded city streets — much less tracing and apprehending them or detecting surreptitious crimes.

Eventually police forces were established to augment citizen self-protection by systematic patrol to deter crime and to detect and apprehend criminals if a crime occurs. Historically there was no thought of the police displacing the citizen's right of self-protection. Nor, as a practical matter, is that remotely feasible in light of the demands a high crime society makes on the limited resources available to police it. Even if all 500,000 American police officers were assigned to patrol they could not protect 240 million citizens from upwards of 10 million criminals who enjoy the luxury of deciding when and where to strike. But there are nothing like 500,000 patrol officers: to determine how many police are actually available on any one shift the 550,000 figure must be divided by four (three shifts per day, plus officers on days-off, sick leave etc.). After this calculation, the resulting number must be cut in half to take account of the officers assigned to investigations, juvenile, records, laboratory, traffic etc., rather than patrol.

Doubtless the deterrent effect of the police helps assure that many Americans will never be so unfortunate as to live in circumstances requiring personal protection. But for those who do need such protection the fact is that police do not and cannot function as bodyguards for ordinary people (though in New York and other major cities police may perform bodyguard services for the mayor and other prominent officials). Consider the matter just in terms of the number of New York City women who each year seek police help, reporting threats by ex-husbands, ex-boyfriends etc.: to bodyguard just those women would exhaust the resources of the nation's largest police department, leaving no officers available for street patrol, traffic control, crime detection and apprehension of perpetrators, responding to emergency calls etc., etc.

Given what New York courts have called "the crushing nature of the burden" the police cannot be expected to protect the individual citizen. Individuals remain responsible for their own personal safety, with police providing only an auxiliary general deterrent. The issue is whether those individuals should be free to choose gun ownership as a means of protecting themselves, their homes and families.

Once again, the law is that police have no duty to protect the public and are not liable for failure to do so, no matter how egregious. My commentary on this horrifying case will follow after the material I am setting out immediately below which is the fact statement from the opinion of the federal court of appeals in Shipp v. MacMahon.

Shipp v. MacMahon

The appellee, Cherie Shipp (Shipp) was involved in an abusive marriage with her husband, Dalton Shipp ("Dalton") in Shreveport, Louisiana. To escape her husband's abuse, Shipp moved into her sister's house near Minden, Louisiana. When Dalton learned of her whereabouts, he made several threatening phone calls to her, which she reported to deputies of the Webster Parish Sheriff's Office (WPSO). Dalton also on several occasions drove by Shipp's sisters house, which Shipp reported to defendant Steve Cropper ("Cropper"), a Webster Parish deputy. Cropper advised that he would do nothing about Dalton.

Shipp then moved to her cousin's residence in Dubberly, which is also in Webster Parish.

Dalton went to the house in Dubberly, attacked Shipp by beating her with a telephone that he ripped from the wall, and hit her with his fist. He threatened that if she reported the incident to law enforcement, she would "find herself in the hospital." After physically abusing her, Dalton took some items belonging to Shipp and her cousin, placed the items in his automobile, and drove off. Despite Dalton's warning, Shipp called the WPSO. Deputy Cropper came to the scene and took a report, but made no immediate effort to arrest Dalton.

Several days later, Deputy Cropper approached Dalton about returning the items he took from Shipp's cousin's residence, but did not arrest him. Dalton was later allowed to turn himself in, and he was charged with simple criminal damage to property and simple battery, both misdemeanor offenses. As a condition of bail, the court ordered that Dalton stay away from Shipp. Later that day, he pleaded guilty to both offenses, and the court ordered him to seek immediate counseling. The court set sentencing for a later date.

Shipp obtained a temporary restraining order ("TRO") which prohibited Dalton from having any contact with her. After Deputy Cropper served Dalton with the TRO, Dalton made several abusive and threatening phone calls to Shipp, which Shipp reported to the WPSO. She was told that nothing could be done about the phone calls, and despite his violations of the TRO and the bail order, the WPSO did not arrest Dalton.

Dalton failed to appear in court for sentencing on the criminal charges, and a bench warrant for his arrest was issued. Although Dalton subsequently appeared in court to answer other criminal charges at the Webster Parish courthouse, deputies nonetheless failed to arrest Dalton for violating the TRO and conditions of bail.

Approximately four months after Dalton failed to appear at the scheduled sentencing hearing, he tracked down Shipp at her other sister's house and talked Shipp out of the house and into his

car. Once in the car, Dalton sped away with Shipp's feet dragging the ground. She attempted to jump out of the car, but Dalton grabbed her by the head. Dalton drove Shipp to a house he had leased in Webster Parish.

Shipp's sister telephoned her mother, Carolyn Gates, who reported the incident to the WPSO. Defendant Betty Shipp was the dispatcher who received the phone call. Apparently, Betty Shipp hung up the telephone without conducting an inquiry into the particulars of the incident. Betty Shipp advised Deputy Cropper of the phone call. He chose to take no action, despite his knowledge of Dalton's propensity for violent behavior. Neither Cropper nor Betty Shipp dispatched information to alert the other deputies.

After having her phone call terminated by the WPSO, Shipp's mother called the Minden Police Department, which dispatched an emergency alert and radioed the WPSO. Shipp's mother then picked up Jerry Gates, Shipp's father, and drove to the Webster Parish courthouse. They observed Deputy Cropper standing idly outside the courthouse. Cropper advised Mr. Gates that he intended to do nothing to apprehend Dalton. After they discussed where Dalton may be located with Shipp, Mr. Gates denounced Cropper's unwillingness to act, and told him that he was heading to the leased house. Deputy Cropper and another deputy pursued Mr. Gates.

Subsequently, Mr. Gates and four deputies arrived at the house. When the deputies made no effort to enter the house, Mr. Gates attempted to approach the house, but was restrained by the deputies. Cropper then knocked on the door, explaining that he had to ascertain whether Shipp was in the house voluntarily with Dalton. No one inside answered Cropper's knock.

Mr. Gates observed what he believed to be a silhouette on the curtain of Dalton with a gun. Mr. Gates again attempted to approach the house, but the deputies ordered him back. A shot rang out from the house and the deputies immediately retreated to their vehicles to put on armored vests. Another shot ranged out as the deputies remained crouched behind their cars.Inside the house, Dalton had raped Shipp. After shooting her in the chest with a 12-gauge shotgun, he shot himself. Shipp staggered to the door and unsuccessfully attempted to open it. She screamed for help, but none of the deputies responded. Shipp eventually staggered out a side door holding her entrails in her hands.

As she exited the house, Shipp's mother and a deputy raced to her aid. Mr. Gates also dashed towards Shipp, but he was abruptly intercepted by Cropper. At Cropper's order, another deputy handcuffed Mr. Gates and removed him from the scene.

Shipp was transported to the hospital, where emergency surgery was performed on her. She was hospitalized for several weeks, followed by rehabilitation, therapy, and follow-up surgery.

Dalton recovered from his wounds and was subsequently charged with aggravated rape, aggravated kidnapping, and attempted second degree murder. As of the date of this opinion, he is currently being detained in Webster Parish jail pending trial, but has been permitted on several occasions to leave the jail and roam relatively unfettered throughout Webster Parish. Since the incident, the WPSO has not imposed any discipline on any deputy.

It will come as no surprise to many of you — but you will be wrong! — that the federal court of appeals held that the lower court was correct in not dismissing the lawsuit here. The fact is that the appeals court recognized that the sheriffs were right "that there is no constitutional violation when the most that can be said is that the police stood by and did nothing, see McKee 877 F.2d at 412,"

In short, civilians have absolutely no right to police protection! The case was upheld only because the plaintiffs' artful lawyer wrote into the complaint a peculiar, and almost certainly false, claim which plaintiffs will not be able to prove at trial so they will lose. The lawyer claimed not that Mrs. Shipp had a right to police protection per se, but that she was deprived of her 14th Amendment constitutional right to equal treatment, i.e., that this police agency discriminated against her and all other women by refusing to give them proterction against violent husbands. To defeat this claim all the police agency will have to do is show what is doubtless true — that in at least some instances it has protected women. It just did not protect Mrs. Shipp probably because her husband and his relatives are friendly w/ the sheriff and the department.

Harlow v. Fitzgerald

In the case of Harlow v. Fitzgerald The modern test for qualified immunity was established in Harlow v. Fitzgerald (1982).

Prior to Harlow v. Fitzgerald, the U.S. Supreme Court granted immunity to government officials only if: (1) the official believed in good faith that his conduct was lawful, and (2) the conduct was objectively reasonable. However, determining an official's subjective state of mind (i.e. did he have a good faith belief that his action was lawful) required a trial, often by jury. Concerns over allowing suits to go this far deterred officials from performing their duties, "[diverted] official energy from pressing public issues, and [deterred] able citizens from acceptance of public office", the Supreme Court handed down the current rule for qualified immunity: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Therefore, the application of qualified immunity no longer depends upon an official's subjective state of mind, but on whether or not a reasonable person in the official's position would have known their actions were in line with clearly established legal principles.

Qualified immunity only applies to acts that are "discretionary" rather than ministerial. Courts specifically distinguish discretionary acts from ministerial acts. A discretionary act requires an official to determine "whether an act should be done or a course pursued" and to determine the best means of achieving the chosen objective. By contrast, a ministerial act is of a "clerical nature" – the official is typically required to perform the action regardless of his own opinion. Even ministerial tasks will sometimes involve a small amount of discretion, but this discretion will not necessarily satisfy the requirements of qualified immunity.

Qualified immunity does not protect officials who violate "clearly established statutory or constitutional rights of which reasonable person would have known". This is an objective standard, meaning that the standard does not depend on the subjective state of mind of the official but rather on whether a reasonable person would determine that the relevant conduct violated clearly-established law.

Whether the law is "clearly established" depends on whether the case law has addressed the disputed issue or has established the "contours of the right" such that it is clear that official's conduct is illegal. It is undisputed that Supreme Court opinions can "clearly establish" the rule for the entire country. However, circuit court of appeals opinions may have a more limited effect. Circuit courts of appeals typically treat their opinions as clearly establishing the law within that circuit—though the Supreme Court has cast doubt on this theory. In order to meet the requirement of "Clearly Established Law", the facts of the instant case must also fairly closely resemble the facts of the case relied on as precedent.

The concept of testing whether the official action was covered by qualified immunity was first raised in the 1991 case Siegert v. Gilley (1991) in which the Supreme Court affirmed a dismissal of a lawsuit due to lack of clear demonstration that a constitutional right had been violated at the time of the action as a necessary precursor for any judicial relief.

Saucier v. Katz

In the case of Saucier v. Katz, 533 U.S. 194 (2001), was a United States Supreme Court case in which the Court considered the qualified immunity of a police officer to a civil rights case brought through a Bivens action.

In 1994, the Presidio Army Base in San Francisco, California was the site of an event to celebrate conversion of the base to a national park. Elliot Katz, the president of a group called In Defense of Animals, brought with him a cloth banner, approximately 4 by 3 ft, that read "Please Keep Animal Torture Out of Our National Parks," to voice opposition to the possibility that the Letterman Army Hospital might be used for experiments on animals.

While Vice President Albert Gore, Jr. began giving a speech, Katz removed the banner from his jacket, started to unfold it, and walked toward the fence and speakers' platform. Petitioner Donald Saucier, a military police officer on duty that day, had been warned by his superiors of the possibility of demonstrations, and respondent had been identified as a potential protester. He and Sergeant Steven Parker, another military police officer, moved to intercept Katz as he walked toward the fence. As Katz reached the barrier and began placing the banner on the other side, the officers grabbed respondent from behind, took the banner, and rushed him out of the area. Saucier and Parker took respondent to a nearby military van, where, respondent claims, he was shoved or thrown inside.

Katz brought an action in the United States District Court for the Northern District of California against petitioner and other officials pursuant to Bivens v. Six Unknown Named Agents, alleging that defendants had violated his Fourth Amendment rights by using excessive force to arrest him.

The Supreme Court in an opinion delivered by Justice Kennedy held that Saucier was entitled to qualified immunity.

The Supreme Court held that qualified immunity analysis must proceed in two steps. A court must first ask whether "the facts alleged show the officer's conduct violated a constitutional right." Then, if a constitutional right was violated, the court would go on to determine whether the constitutional right was "clearly established."

Pearson v. Callahan

In the case of Pearson v. Callahan, 555 U.S. 223 (2009), was a case decided by the United States Supreme Court dealing with the doctrine of qualified immunity.

The case centered on the application of mandatory sequencing in determining qualified immunity as set by the 2001 decision, Saucier v. Katz, in which courts were to first ask whether a constitutional right was clearly violated by a government official at the time of the action before evaluating if a law had clearly been broken. The Court took to the unusual step of asking the parties to argue whether past precedent should be overturned. The theory under Saucier is that

without courts first ruling on constitutional questions, the law would go undeveloped in many areas. Many legal commentators have criticized the ruling in Saucier.

The Supreme Court, in its opinion, withdrew the mandatory sequencing required under Saucier, giving courts the discretion of asking the constitutional or law question first. While this discretionary approach can free resources of the court, it has led to additional criticism, as it can often favor defendants, particularly in cases involving excessive force and police brutality.

In 2002, a confidential police informant working with five officers from the Central Utah Narcotics Task Force went undercover at the Fillmore, Utah mobile home of a suspected drug dealer, Afton D. Callahan, to purchase $100 worth of methamphetamine. The officers had arranged for the informant, who was "wired" with a listening device, to give them a sign indicating a successful drug deal; when he did, they entered the home.

The case focuses on "consent once removed," a theory espoused by some lower courts that acts as an exception to the search warrant requirement of the Fourth Amendment. Under the doctrine, if a suspect to a crime opens the door for an undercover police officer, the suspect unknowingly is also allowing further police officers to enter without a warrant. In the criminal case at issue in this civil case, the police officers sent an undercover informant in to make a drug deal. When the informant succeeded, the police officers then entered Callahan's home without a warrant. The police in the case argued that "consent once removed" applied, since the informant was acting as an agent of the police.

The criminal charges against Callahan were prosecuted in Utah state court. The judge rejected Callahan's argument that the evidence obtained from the search was not admissible because the search was unconstitutional, and Callahan accepted a conditional guilty plea while he appealed the judgment. A Utah appeals court found the search unconstitutional and overturned the guilty verdict.

Callahan then filed a civil lawsuit against five members of the Central Utah Narcotics Task Force who had conducted the search, claiming they violated his Fourth Amendment rights. If the case was not decided in the officers' favor, they would face the prospect of paying monetary damages to the plaintiff. The officers claimed that they could not be sued due to qualified immunity, a doctrine that states government officials cannot be held liable for violating a facet of the Constitution that is unclear.

The question had divided lower courts, which disagreed about the "consent once removed" doctrine. Federal judge Paul G. Cassell said in 2006 that even if the search was unconstitutional, the police officers could be granted immunity because at the time of the search, it would have

been reasonable for them to believe that it was constitutional. He noted that three federal circuits abided by "consent once removed," although not the Tenth, in whose jurisdiction Utah falls.

However, the U.S. Court of Appeals for the Tenth Circuit ruled against the officers' claim of immunity and allowed Callahan to proceed with the lawsuit. The court did not adopt "consent once removed" as other federal circuits have done. The appeals court said that a reasonable police officer would have known not to proceed in the case without a warrant.

The Supreme Court agreed to hear the case in March 2008.

The Court added another issue to the officers' request for certiorari: how to deal with officers' requests for immunity from constitutional issues. This issue was last heard in the Supreme Court in 2001 in Saucier v. Katz, in which the Court ruled that such suits had to be adjudicated in two phases: first, deciding the constitutionality, and then deciding if the law had been unclear enough for officers not to be liable. Saucier v. Katz is widely criticized because it has resulted in judges spending time deciding difficult constitutional issues, even in cases where official immunity obviously applies and the case will eventually be thrown out.

The Court's decision severely limited Saucier v. Katz 533 U.S. 194 (2001). The Court modified Saucier's two-step inquiry in two ways. First, it eliminated the requirement that qualified immunity issues be considered in order. Thus, courts after Pearson can first consider whether federal law forbidding an action was clearly established at the time of that action, instead of first analyzing the sometimes more difficult question of whether the law actually forbade the action, regardless of its clarity. Second, it made Saucier's two-step process advisory. The Court said: "we conclude that, while the sequence set forth (in Saucier v. Katz) is often appropriate, it should no longer be regarded as mandatory."

This case allowed judges to skip the question of whether or not a police officer used excessive force and to focus solely on whether or not the conduct violated clearly established law, which appeal courts have frequently done. Some legal experts assert that this has created a "closed loop" in which "the case law gets frozen" because it largely prevents the introduction of case law that clearly establishes new instances of the use of excessive force.

Morse v. Frederick

In the case of Morse v. Frederick, (551 U.S. 393 (2007)), is a United States Supreme Court case where the Court held, 5–4, that the First Amendment does not prevent educators from suppressing student speech that is reasonably viewed as promoting illegal drug use at or across the street from a school-supervised event. In 2002, Juneau-Douglas High School principal

Deborah Morse suspended Joseph Frederick after he displayed a banner reading "BONG HiTS 4 JESUS" [sic] across the street from the school during the 2002 Winter Olympics torch relay. Frederick sued, claiming his constitutional rights to free speech were violated. His suit was dismissed by the federal district court, but on appeal, the Ninth Circuit reversed the ruling, concluding that Frederick's speech rights were violated. The case then went on to the Supreme Court.

Chief Justice Roberts, writing for the majority, concluded that the school officials did not violate the First Amendment. To do so, he made three legal determinations: first, that "school speech" doctrine should apply because Frederick's speech occurred "at a school event"; second, that the speech was "reasonably viewed as promoting illegal drug use"; and third, that a principal may legally restrict that speech—based on the three existing First Amendment school speech precedents, other Constitutional jurisprudence relating to schools and a school's "important, indeed, perhaps compelling interest" in deterring drug use by students.

One scholar noted that "by its plain language, Morse's holding is narrow in that it expressly applies only to student speech promoting illegal drug use." She adds, however, that courts could nonetheless apply it to other student speech that, like speech encouraging illegal drug use, similarly undermines schools' educational missions or threatens students' safety. "Further, Morse arguably permits viewpoint discrimination of purely political speech whenever that speech mentions illegal drugs—a result seemingly at odds with the First Amendment."